(3)

Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-911

In the Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED OIL & GAS INC., PETITIONER

v.

SOUTHERN UNION COMPANY AND FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID N. COOK
Acting General Counsel
JEROME M. FEIT
Solicitor
SAMUEL SOOPPER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the court of appeals properly exercised its jurisdiction to review an order of the Federal Energy Regulatory Commission that permitted petitioner, a natural gas producer, to collect a state court judgment against a natural gas gathering company based on the latter's refusal to pay certain contract prices for natural gas.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

A.L.T. Corp. v. *Small Business Admin.*, 801 F.2d 1451 (5th Cir. 1986)	9
Allen v. *McCurry*, 449 U.S. 90 (1980)	9, 10
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981)	4, 5, 6, 7, 8, 10
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Found.*, 402 U.S. 313 (1971)	10
Brown v. *Felsen*, 442 U.S. 127 (1979)	9
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958)	7
Consolidated Oil & Gas, Inc. v. *FERC*, 806 F.2d 275 (D.C. Cir. 1987)	3
Consolidated Oil & Gas, Inc. v. *Southern Union Co.*, 106 N.M. 719, 749 P.2d 1098 (1987), cert. denied, 484 U.S. 1063 (1988)	3
District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462 (1983)	9
Kalb v. *Feurerstein*, 308 U.S. 433 (1940)	9
Kremer v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982)	9
Marrese v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985)	9
Mississippi Power & Light Co. v. *Mississippi*, 108 S. Ct. 2428 (1988)	6, 9

Cases – Continued	Page
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951)	7
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986)	6, 7
Pan American Petroleum Corp. v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961)	8
Schneidewind v. *ANR Pipeline Co.*, 108 S. Ct. 1145 (1988)	7
Southern Union Gathering Co., 28 F.E.R.C. ¶ 61,225 (1984), reh'g denied, 30 F.E.R.C. ¶ 61,350 (1985), aff'd *sub nom. Consolidated Oil & Gas, Inc.* v. FERC, 806 F.2d 275 (D.C. Cir. 1986)	3
Southern Union Co., 35 F.E.R.C. ¶ 61,369 (1986), reh'g denied, 39 F.E.R.C. ¶ 61,212, reaff'd, 41 F.E.R.C. ¶ 61,203 (1987)	4
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)	7
Statutes and rule:	
Natural Gas Act, 15 U.S.C. 717 *et seq.*	2
§ 4(a), 15 U.S.C. 717c(a)	6
§ 4(c), 15 U.S.C. 717c(c)	6
§ 4(d), 15 U.S.C. 717c(d)	6
§ 19, 15 U.S.C. 717r	4, 7
§ 22, 15 U.S.C. 717u	5
Natural Gas Policy Act, 15 U.S.C. 3301 *et seq.*	2
§ 504, 15 U.S.C. 3414	5
§ 506, 15 U.S.C. 3416	7
28 U.S.C. 1738	9
Sup. Ct. R. 14.1(a)	11
Miscellaneous:	
18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (1981 & Supp. 1989)	9-10
Restatement (Second) of Judgments (1982)	9

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-911

CONSOLIDATED OIL & GAS INC., PETITIONER

v.

SOUTHERN UNION COMPANY AND FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 857 F.2d 812. The order of the Federal Energy Regulatory Commission permitting petitioner to collect the state court judgment (Pet. App. 40a-53a) is reported at 35 F.E.R.C. ¶ 61,359. The order of the Federal Energy Regulatory Commission denying rehearing (Pet. App. 54a-56a) is reported at 39 F.E.R.C. ¶ 61,212. The order of the Federal Energy Regulatory Commission reaffirming and clarifying its prior orders in the case (Pet. App. 57a-66a) is reported at 41 F.E.R.C. ¶ 61,203. The initial order of the Federal Energy Regulatory Commission (Pet. App. 14a-25a) and its order denying rehearing (Pet. App. 26a-39a) are reported at 28 F.E.R.C. ¶ 61,225, and 30 F.E.R.C. ¶ 61,350, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 93a-94a) was entered on September 23, 1988. A petition for rehearing was denied on September 12, 1989. Pet. App. 95a. The petition for a writ of certiorari was filed on December 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the District of Columbia Circuit's review of a declaratory order of the Federal Energy Regulatory Commission holding that federal law did not prevent a natural gas producer, petitioner Consolidated Oil & Gas, Inc., from collecting a state court judgment obtained against a natural gas gathering company, respondent Southern Union Company.

1. During the 1960s and early 1970s, Southern Union purchased natural gas from Consolidated that was produced in the San Juan Basin area of New Mexico. Southern Union bought that gas under long-term contracts that contained "favored nation" clauses requiring Southern Union to pay Consolidated prices equal to the highest paid to any producer in the San Juan Basin. Four of those contracts involved gas sold for resale in interstate commerce and were thus subject to regulation by the Federal Energy Regulatory Commission under the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act (NGPA), 15 U.S.C. 3301 *et seq.* Pet. App. 2a-3a, 15a-16a.

In 1979, after reaching a settlement agreement several years earlier, Consolidated filed an action against Southern Union in New Mexico state court. That action, which raised claims for breach of contract, fraud, and negligent misrepresentation, challenged Southern Union's refusal to pay an amount higher than the prevailing interstate rate on

four contracts for natural gas.[1] After a bench trial, the state court found that Southern Union had negligently misrepresented that the gas purchased under the four contracts was resold in intrastate markets, thereby inducing Consolidated to release certain claims resolved by the earlier settlement. Pet. App. 3a-4a, 41a-45a. The trial court awarded Consolidated compensatory damages of approximately $8.5 million, "which is the amount equal to the difference between what it was paid by SOUTHERN UNION under the settlement agreement and the amount it would have been paid had the representations of SOUTHERN UNION been true." *Id.* at 90a-91a.[2] The New Mexico Supreme Court affirmed that judgment. *Id.* at 67a-80a; *Consolidated Oil & Gas, Inc.* v. *Southern Union Co.*, 106 N.M. 719, 749 P.2d 1098 (1987), cert. denied, 484 U.S. 1063 (1988).

2. While Southern Union's appeal was pending before the New Mexico Supreme Court, Southern Union petitioned the Commission for a declaratory order "that Consolidated could not collect its judgment because to do so would con-

---

[1] Initially, the state trial court and Southern Union each sought rulings from the Commission concerning the jurisdictional status of the gas sold under those contracts. The Commission ruled that that gas was interstate gas for which Consolidated could not collect contract damages in excess of federal rates without first obtaining authority from FERC. Pet. App. 18a-19a, 27a-29a; *Southern Union Gathering Co.*, 28 F.E.R.C. ¶ 61,225, at 61,427 (1984), reh'g denied, 30 F.E.R.C. ¶ 61,350, at 61,708 (1985), aff'd *sub nom. Consolidated Oil & Gas, Inc.* v. *FERC*, 806 F.2d 275 (D.C. Cir. 1986). On Consolidated's motion for rehearing, the Commission later made clear that, if the situation arose, it would consider any actual award of damages in light of a number of factors, including the amount and basis of the damages, the relevant facts of the case, and the applicable legal principles. Pet. App. 34a; 30 F.E.R.C. ¶ 61,350, at 61,711.

[2] The trial court also awarded Consolidated prejudgment interest of approximately $2.6 million. Pet. App. 92a.

stitute exacting an unlawful price for interstate gas." Pet. App. 5a. Consolidated intervened and opposed that petition. *Id.* at 47a.

In its final order issued in November 1987,[3] the Commission denied Southern Union's petition. The Commission concluded that the damages awarded to Consolidated represented tort damages as opposed to contract damages, and thus were not compensation for interstate gas sold under the contracts. Pet. App. 62a-64a. The Commission distinguished this case from *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) (*Arkla*), since "under the specific facts presented here, the damages awarded do not constitute part of the price of gas," Pet. App. 65a. Accordingly, the Commission held that federal law governing interstate sales of natural gas did not preempt the New Mexico state court judgment and that Consolidated could lawfully collect that damages award. *Id.* at 65a-66a.

Southern Union then filed a petition for review of the Commission's final order in the District of Columbia Circuit. Pet. App. 2a; see Section 19 of the NGA, 15 U.S.C. 717r.[4]

3. In September 1988, the court of appeals granted Southern Union's petition for review, set aside FERC's order

---

[3] As the court of appeals noted, FERC "has entered three orders, all adverse to Southern Union, essentially on the grounds that the [state court] judgment is in fact an award of damages for tort and not for the purchase price of gas." Pet. App. 5a; see *id.* at 52a-53a, 55a-56a, 65a; *Southern Union Co.*, 35 F.E.R.C. ¶ 61,359, at 61,822 (1986), reh'g denied, 39 F.E.R.C. ¶ 61,212, at 61,745, reaff'd, 41 F.E.R.C. ¶ 61,203, at 61,529 (1987). In this case, the court of appeals reviewed only the Commission's final order reaffirming its earlier decisions. See Pet. App. 5a.

[4] In March 1988, while Southern Union's petition for review was pending before the court of appeals, Southern Union paid the state court judgment to Consolidated. See Pet. 7.

refusing to issue the declaratory order sought by Southern Union, and remanded the case to the Commission for further proceedings. Pet. App. 1a-13a. As a threshold matter, the court of appeals rejected Consolidated's claim that the Commission lacked jurisdiction to consider Southern Union's petition for a declaratory order. First, the court concluded that the Commission's statutory authority "to determine and enforce first-sale price ceilings for natural gas" includes "the incidental power to determine whether in fact a state court action, however denominated, has the impermissible effect of infringing the exclusively federal prerogative." *Id.* at 6a, 7a (citing 15 U.S.C. 717u, 3414, and *Arkla*, 453 U.S. at 578-582). Second, the court determined that the prior judgment of the New Mexico Supreme Court did not bar the Commission from considering Southern Union's petition under the doctrines of collateral estoppel and issue preclusion. Pet. App. at 7a-8a.

Turning to the merits of the Commission's ruling, the court of appeals held that the Commission misapplied the "filed rate doctrine" set forth in *Arkla*. Pet. App. 8a. In particular, the court determined that the Commission erred by not "examin[ing] the practical effect of the state remedy" in this case. *Id.* at 10a. The court reviewed the record and concluded that the state trial court awarded damages "that unquestionably were for the price of gas." *Id.* at 11a. In the court's view, "the state measure of damages is based upon, and has the effect of awarding, a price for interstate gas that, to the extent the price exceeds federal guidelines, the state court has no power to award." *Id.* at 12a. Accordingly, the court concluded that the "calculation of damages * * * employed by the New Mexico courts was inconsistent with preemptive federal gas-price regulation and that the Commission failed to follow the controlling *Arkla* case." *Id.* at 13a (internal quotation marks and citation omitted).

In September 1989, the court of appeals denied Consolidated's petition for rehearing and suggestion of rehearing en banc. Pet. App. 95a-97a.[5]

ARGUMENT

1. Petitioner Consolidated Oil & Gas, Inc., principally contends (Pet. 11-15) that the court of appeals lacked authority to nullify the New Mexico state court damages award in the context of reviewing the Commission's declaratory order. This claim cannot be reconciled with the system of regulation established by the Natural Gas Act.

Under Section 4(c) of the NGA, 15 U.S.C. 717c(c), sellers of natural gas, such as petitioner, must file rates charged for natural gas with the Commission; such rates are lawful only if the Commission determines that they are "just and reasonable." Section 4(a) of the NGA, 15 U.S.C. 717c(a). The Commission exercises exclusive authority to determine the reasonableness of filed rates and no seller of interstate gas may lawfully collect a rate higher than that filed and approved by the Commission. Section 4(d) of the NGA, 15 U.S.C. 717c(d); see, *e.g.*, *Mississippi Power & Light Co.* v. *Mississippi*, 108 S. Ct. 2428, 2439-2442 (1988); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 963-965 (1986); *Arkla*, 453 U.S. at 576-577.

As this Court has recognized, the Commission exercises "exclusive jurisdiction over the transportation and sale of

---

[5] Judge Williams, joined by Chief Judge Wald and Judge Buckley, dissented from the denial of rehearing en banc on the ground that further review was necessary "to determine whether anything about the filed rate doctrine requires exclusive jurisdiction." Pet. App. 98a.

After rehearing was denied, Southern Union filed a motion with the Commission seeking an order requiring Consolidated to refund the state court judgment. That motion remains pending before the Commission. See Pet. 10.

natural gas in interstate commerce for resale," *Schneidewind* v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1151 (1988), which necessarily includes the power to fix and enforce rates for those transactions. Under the filed rate doctrine,[6] "the right to a reasonable rate is the right to the rate which the Commission files or fixes, and * * * except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its [*sic*] opinion, it is the only or the more reasonable one." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251-252 (1951); see, *e.g.*, *Nantahala Power & Light*, 476 U.S. at 964-965; *Arkla*, 453 U.S. at 577. Under the Natural Gas Act, the sole avenue for review of Commission orders pertaining to interstate natural gas is in the United States courts of appeals. Section 19 of the NGA, 15 U.S.C. 717r; see Section 506 of the NGPA, 15 U.S.C. 3416; see also *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-336 (1958).

As a consequence of that statutory scheme and the filed rate doctrine, this Court has made plain that state courts, in the context of resolving actions filed under state law, lack authority to award damages that represent a change in the rate for natural gas approved by the Commission and provided for by Congress in the NGA or the NGPA. *E.g.*, *Arkla*, 453 U.S. at 578-579; *Montana-Dakota*, 341 U.S. at 251-252; see also *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). As this Court stated,

> the mere fact that respondents brought this suit under state law would not rescue it, for when Congress has

---

[6] The "filed rate doctrine," as this Court has stated, generally "prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act * * *." *Arkla*, 453 U.S. at 573.

> established an exclusive form of regulation, "there can be no divided authority over interstate commerce." *Missouri Pacific R. Co.* v. *Stroud*, 267 U.S. 404, 408 (1925). Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.

Arkla, 453 U.S. at 580.

The principles outlined above confirm that in this case the New Mexico state courts, although empowered to award tort damages and damages for breach of contract under state law, had no authority to determine conclusively whether or not such a damages award was preempted by the NGA or the NGPA. To the contrary, only the Commission, subject to review by a federal court of appeals, may make that determination. For that reason, petitioner's contention that the prior state court judgment bound the court of appeals in its review of the Commission's declaratory order conflicts with the system of regulation established by the NGA and the NGPA.[7]

---

[7] Petitioner mistakenly relies (Pet. 12) on *Pan American Petroleum Corp.* v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961). In that case, this Court held that the NGA did not preclude the state court from adjudicating "traditional common-law [contract] claims" involving the purchase of natural gas where "[n]o right is asserted under the Natural Gas Act." *Id.* at 663. And the Court made clear that that lawsuit did not involve any issue with respect to "the extent to which the Natural Gas Act reinforces or abrogates the private contract rights * * * in controversy." *Id.* at 664. Here, by contrast, the state court action plainly involved the ultimate federal question surrounding a recovery in excess of rates prescribed by federal law.

Similarly, petitioner's reference (Pet. 11) to a "head-on collision between the federal and state courts" in this case is misleading. Under a straightforward application of the filed rate doctrine, the court of appeals' judgment that federal law precluded the state court damages award means that the state court's contrary holding was preempted by federal law. This result would be clear if FERC had initially held that the state court judgment violated the filed rate doctrine and the court of appeals affirmed; the result should be no different simply because FERC initially reached a contrary conclusion and the court of appeals reversed. Accordingly, on remand from the decision below, the proceedings before the Commission will focus on Southern Union's claim for a refund of the damages award improperly collected by petitioner. See note 5, *supra*.

2. Petitioner also contends (Pet. 12) that the court of appeals' judgment conflicts with decisions such as *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 484 n.16 (1983), and *Allen* v. *McCurry*, 449 U.S. 90, 105 (1980). In those decisions, the Court reaffirmed the general principle that state courts may adjudicate federal constitutional and statutory claims. But that fundamental principle does not require a federal court to follow a prior state court judgment where, as here, such preclusive effect would be inconsistent with the statutory scheme Congress has enacted to govern the subject matter at issue—the regulation of proper rates charged for the sale of interstate natural gas. See, *e.g.*, *Brown* v. *Felsen*, 442 U.S. 127, 134-139 (1979); *Kalb* v. *Feurerstein*, 308 U.S. 433, 438-444 (1940); see *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386 (1985); Restatement (Second) of Judgments § 86 comment b (1982); cf. *Mississippi Power & Light*, 108 S. Ct. at 2440-2442; *A.L.T. Corp.* v. *Small Business Admin.*, 801 F.2d 1451, 1462-1463 (5th Cir. 1986).[8]

[8] For that reason as well, petitioner errs in contending (Pet. 12-13) that the court of appeals violated 28 U.S.C. 1738 and common law prin-

Indeed, were preclusive effect to be given to prior state court litigation (in which FERC would not be a party), the Commission would be forced continuously to monitor such proceedings and intervene in any private actions that raise claims that might affect FERC's regulatory jurisdiction over the sale of interstate natural gas. Congress clearly had no intention of adopting such an inefficient scheme that would frustrate the purposes of exclusive federal regulation by the Commission. Instead, application of the filed rate doctrine subject to the exclusive authority of the Commission, as reviewed only by the federal courts of appeals, ensures proper administration of the uniform regulatory scheme created by Congress.

3. Finally, petitioner suggests in passing (Pet. 16-17) that further review is necessary because this case presents an issue the Court reserved in *Arkla*, namely, "whether the filed rate doctrine applies in the face of fraudulent conduct." *Arkla*, 453 U.S. at 583 n.13. However, no such issue is presented by the record in this case. As the court of appeals recognized, "[t]he state [trial court] has found that Southern Union's conduct was negligent but not fraudulent." Pet. App. 12a; see *id.* at 91a. And although the New Mexico Supreme Court noted that the trial included "some evidence of actual or constructive fraud," *id.* at 77a, that court also observed that

---

ciples of res judicata, which ordinarily would have applied and required it to follow the prior state court judgment. See, *e.g.*, *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 466-468 (1982); see generally 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4470 (1981 & Supp. 1989). In any event, inasmuch as FERC was not a party to the New Mexico state court litigation, principles of res judicata could not bar the court of appeals from de novo consideration of the Commission's declaratory order. See, *e.g.*, *Allen* v. *McCurry*, 449 U.S. 90, 94-95 (1980); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found.*, 402 U.S. 313, 329 (1971).

the trial court "did not find that Consolidated had proved fraud by clear and convincing evidence as required by law," *ibid.* Accordingly, this case does not present an occasion for the Court to address the issue left unresolved in *Arkla*.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General**

DAVID N. COOK
Acting General Counsel

JEROME M. FEIT
Solicitor

SAMUEL SOOPPER
Attorney
Federal Energy Regulatory Commission

JANUARY 1990

---

[9] In any event, petitioner has not sought certiorari on that question. See Pet. i; Sup. Ct. R. 14.1(a).

Petitioner also suggests (Pet. 15-16) that the court of appeals' failure to defer to the Commission's decision calls for this Court's review. Apart from the fact that petitioner has not sought certiorari on that question, further review is plainly not warranted where, as here, the Commission has decided to accept the court of appeals' judgment regarding the application of the filed rate doctrine and *Arkla* to the particular facts of this case.

* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00722